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In the Supreme Court of the United States

October Term, 1975

76-1829

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 12, AFL-CIO; TRUSTEES OF ELECTRICAL INDUSTRY VACATION FUND; TRUSTEES OF EIGHTH DISTRICT ELECTRICAL BENEFIT FUND; TRUSTEES OF EIGHTH DISTRICT ELECTRICAL WORKERS PENSION TRUST: and TRUSTEES OF JOINT APPRENTICESHIP AND TRAINING TRUST FUND,

Petitioners,

v.

A-1 ELECTRIC SERVICE, INC., a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In their Petition for Writ of Certiorari the Petitioners have contended that the issue presented is the measure of damages to be allowed to a union upon a finding that an employer has breached his contract with the union. The

decisions of both the District Court and the Court of Appeals have applied principles of the common law of contracts to this issue, and the Petition does not demonstrate that any overriding issue of Federal law is involved. As in many lawsuits, the real dispute centers upon the application of general principles of contracts and damages to the precise factual circumstances of the instant case.

Because of this fact, it is necessary to an understanding of the controversy to examine in detail the events of May 17, 1973, when the Union withdrew its members from further employment with Respondent. These details are either glossed over or entirely omitted in the Statement presented by Petitioners. As noted in the decisions below, it is undisputed that on May 17, 1973 Respondent was indebted to the various Petitioners (Plaintiffs below) for past due installments of dues and fringe benefit payments for union members. As noted in the District Court's Findings of Fact, the union had repeatedly threatened to invoke Article 3.23 of the contract as a result of the delinquency. On May 7, 1973, the union's business manager wrote to A-1:

> Due to the very demanding restraints placed upon me by our International and the National Electric Benefit Fund, you have left me no choice but to invoke Article 3, Section 3.23 of the Agreement between your firm and our local Union and remove the men if the delinquency is not paid by May 15, 1973. (Ex. C, I-55)

The union's business manager testified that on May 17, 1973, he went to the premises of the company and asked its president, Richard Nicholas, if the deficiency could be paid. Receiving a negative reply, he then told the union members present to report to the union hall for assignment to a different employer. (I-25, 27)

Petitioners' Statement indicates that termination of the contract was not mentioned. However, Mr. Nicholas affirmatively testified that the business manager said that he was terminating the agreement (I-68). In reply the business

manager denied that he gave any indication of doing anything other than invoking Article 3.23 (I-78). However, in pertinent part Article 3.23 provided:

> Individual employers who fail to remit as provided above shall be additionally subject to having this Agreement terminated upon seventy-two (72) hours notice in writing being served by the Union, provided the Individual employer fails to show satisfactory proof that the required payments have been paid to the Local Employees Benefit Board.
>
> The failure of an individual employer to comply with the applicable provisions of the National Employees Benefit Agreement shall also constitute a breach of this labor agreement.

Under the union's theory of the case, it had not terminated the agreement on May 17, 1973; it had simply withdrawn its members from further employment with the company. It is undisputed that the company never served any formal notice of termination of the agreement upon the union. However, the company was acting under the belief that the agreement had been terminated by the Union on May 17, 1973, when the Union refused to permit union members to continue working for the company. The company therefore believed that there was no contract remaining to terminate, and that formal notice of termination on its part would have been redundant.

There was no evidence that the union members which the union withdrew from Respondent's employment were not subsequently gainfully employed on other assignments. It is undisputed that subsequent to May 17, 1973, the company did not cure its delinquency and that the union did not refer any electricians or apprentices for employment (I-69). There was no evidence that the union had suffered financially in any way subsequent to May 17, 1973; nor was there any evidence that any of its members had experienced any lack of employment.

ARGUMENT

THE APPLICATION OF GENERAL PRINCIPLES OF CONTRACTS AND DAMAGES TO THE PRECISE FACTS OF THIS CASE DOES NOT PRESENT AN ISSUE WARRANTING THE EXERCISE OF THIS COURT'S SUPERVISORY JURISDICTION.

Based upon the finding that the company had been in breach of its agreement with the union, both of the opinions below concluded that the proper measure of damages would be determined by the general law of contracts, citing *Brotherhood of Railroad Trainmen v. Denver & R.G.W.R.R.*, 338 F2d 407 (10th Cir. 1964). The general principle cited in that case is that one injured by breach of an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned. Absent evidence of any actual loss, recovery is properly limited to nominal damages. In the instant case there was simply a failure of proof on the part of the plaintiffs as to any actual loss. Instead they have asked the lower courts, and now this Court, to fashion a remedy for them in vindication of some fancied national policy.

This issue must be examined and considered in light of the fact that it was the union which, on May 17, 1973, refused to permit its members to continue working for Respondent. Prior to doing so, the Union had given advance written notice of its intention to invoke Article 3.23 of the contract. This provision permitted the Union to terminate the contract upon 72 hours written notice in the event of delinquency in payments by the employer. Although there was conflict in the evidence concerning whether the union representative expressly used the word "termination" at the time of his action, it is clear that the action taken was to invoke this Article.

Therefore, the instant case is completely unlike those cases upon which Petitioners rely, such as *School District v. Propes*, 155 Colo. 40, 392 P.2d 292 (1964), and *Taylor v. Tulsa Tribune Co.* 136 F.2d 981 (10th Cir. 1943), where an

employer discharged an employee. This case must be determined in light of the fact that it was the Union which voluntarily disassociated itself and its members from further employment by Respondent. In a sense the Union may be viewed as having taken action in mitigation of damages. The fact that its efforts at mitigation of damages were apparently successful does not entitle it to something more.

Subsequent to May 17, 1973, Respondent found itself in a situation where it could not pay Petitioners the money which it owed, and it could not obtain employees from the Union. Hence it was compelled as a matter of survival to obtain non-union help. There is no national policy which requires that under these circumstances the Petitioners be awarded a windfall in the form of dues and benefits for a period of time during which they refused to provide union employees.

The decisions in *Bangor & A.R.R. v. Brotherhood of Loc. Fire. & Eng.*, 442 F2d 812 (D.C. Cir. 1971) and *Burlesque Artists Ass'n. v. I. Hirst Enterprises*, 267 F2d 414 (3rd Cir. 1959), as well as the other cases cited by Petitioners are not controlling. None of these cases deal with a situation where a union voluntarily withdrew its members from employment. In each instance the employer either discharged or deliberately refused to hire employees.

The Court of Appeals concluded that damages should be measured in accordance with the general principle that damages should be limited to those that could have been fairly and reasonably contemplated by the parties at the time of the execution of the agreement. This led to its decision to limit the damages to those which could have accrued by the end of the contractual year, May 31, 1973. Under the particular circumstances of this case it declined to apply the automatic renewal provisions of the contract, finding that A-1's intent to terminate the agreement was adequately manifest.

In seeking to overturn this decision, Petitioners argue that the Court of Appeals should have applied cases requiring

notice of termination of union contracts to be in writing. Again, this argument overlooks the fact that the union had already pulled its members off the job. Respondent was led to believe that the union itself had terminated the contract, and that written notice to that effect from Respondent would be superfluous. Taking these factors into account, the decision of the Court of Appeals reached a result which was entirely equitable and just. The Petitioners are not entitled to be placed in a better position than they would have been had the contract been performed in its entirety. *United Protective Workers v. Ford Motor Co.*, 223 F.2d 49 (7th Cir. 1955).

When an employee justifiably abandons his employment due to a breach of contract by the employer, his recovery is measured by the compensation due for work performed up to the date of termination. 53 *Am. Jr. 2d* 161, Master & Servant, Sec. 89, 56 *C.J.S.* 555, Master & Servant, Sec. 113. Thus in *Universal Pictures v. Cummings*, 150 F.2d 986 (9th Cir. 1945) it was recognized that an employee was entitled to terminate an employment contract upon the employer's failure to pay part of the compensation due to him, but no compensation was awarded beyond the date of termination.

Having indicated that it was no longer bound to perform under the contract, the union may not seek to bind the company thereafter to that same contract. The principle applies alike to unions and employers. In *Boeing Airplane Co. v. Aeronautical Industrial Dist.*, 91 F.Supp. 596 (W.D. Wash. 1950) aff'd. 188 F.2d 357, cert. den. 342 U.S. 821, the employer sent a letter giving notice of its termination of the bargaining agreement as a result of the union's breach of contract by a strike. It was held that the employer could not thereafter recover damages against the union for subsequent breach of contract in continuing the strike. As the court stated at 91 F.Supp. 613:

> If the facts exist which justify a rescission by one party, and he exercises his right and declares a rescission in some effectual manner, he terminates the contract, and it cannot thereafter be made the basis of an action for damages caused by a breach of its covenants.

Apparently recognizing that no damage has been shown to either the Union or any of its members subsequent to May 17, 1973, Petitioners intimate at pages 13 and 14 of their Brief that the fringe benefits under the contract were available to all electrical workers employed by the company. The mere fact that the company regarded itself as obligated under the contract to pay dues and fringe benefit payments based upon the wages of the non-union son of the stockholders does not show that the son, R.F. Nicholas, ever received any benefit from those payments. Union owed no correlative duties to its non-members, and such money represented a windfall to it. Likewise any judgment beyond that awarded by the trial court would constitute a pure windfall.

The Petitioners fall far short in their claim that the result under the particular facts of this case undercuts the policy of our national labor legislation. Very simply, the union made a voluntary decision to withdraw its members from employment with Respondent. The union urged below, as it urges here, that it should be permitted to continue accruing and collecting dues indefinitely while refusing to make its members available for employment. Nothing in our national policy requires any such inequitable result.

CONCLUSION

This case presents only the application of traditional principles of the law of contracts and damages to a set of narrow factual circumstances. The paucity of authority dealing with facts similar to those at bar suggests that they occur relatively infrequently. The decisions of the courts below reached a result which was fair under these circumstances. A writ of certiorari is not warranted.

Respectfully submitted,

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